Supreme Court, U.S.
FILED

No. 01 122 JUL 17 2001

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IN THE SUPREME COURT OF THE UNITED STATES

HENRY L. WITHERSPOON,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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63 pgs

QUESTIONS PRESENTED

Is the doctrine expatiated in *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.492 (1998) violated by the Pennsylvania Supreme Court doctrine that there can be a "consent-in-fact"--in contradistinction to a "legal-fiction-consent"--to a motor vehicle search although the alleged "consenter" is stipulated to believe that the police can successfully conduct the same search immediately and, using its fruits, obtain the criminal conviction and sentencing of the alleged consenter even if "consent" is withheld?

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Henry L. Witherspoon, respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

OPINIONS BELOW

The Pennsylvania Supreme Court, Western District, issued an Order dated April 18, 2001, at 457 W.D. Allocatur Docket 2000, which denied Petitioner's Petition for Allowance of Appeal. Said Order is reproduced herein at Appendix A. The Pennsylvania Superior Court, Western District, issued an Opinion and Order dated July 3, 2000, which reversed and remanded the lower court's suppression of evidence seized by the Pennsylvania State Police. Said Opinion and Order is reproduced herein at Appendix B. The trial court, the Court of Common Pleas for the Sixth Judicial District of Pennsylvania, issued an Opinion and Order dated October 13, 1999, in which the court suppressed marijuana seized from an automobile pursuant to a written consent to search given after a valid traffic stop.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Supreme Court Rule 10(c), 28 U.S.C. § 1257. On April 18, 2001, the Supreme Court of Pennsylvania denied Mr. Witherspoon's Petition for Allowance of Appeal, thereby leaving extant the Opinion and Order of the Superior Court of Pennsylvania of July 3, 2000. The decision of the Superior Court decided an important question of federal law that has not been, but should be, settled by this Court, and decided an important federal question in a way that conflicts with relevant decisions of this Court. This Petition has been filed within 90 days of the Order of the Pennsylvania Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

Petitioner, Henry L. Witherspoon, was arrested on December 7, 1998, and charged with possession of marijuana, possession with intent to deliver marijuana and possession of drug paraphernalia. Petitioner was driving a rented vehicle on Interstate 90 on that date. He was from Michigan and was returning from a trip to New York City. He was observed by Trooper Rogers of the Pennsylvania State Police and was clocked going 62 mph in a 55 mph zone. Petitioner was stopped for speeding and because he appeared to the Trooper to be underage. After being stopped, it became apparent that the Petitioner was legally old enough to drive but was not licensed either in Michigan or elsewhere.

After issuing appellant a citation for driving without a license, Trooper Rogers returned Petitioner's identification card and paperwork to him and informed him that he was free to leave. Before Mr. Witherspoon could drive away, Trooper Rogers asked him if he would consent to a search of the car. Petitioner signed a consent form. Several more troopers arrived at the scene and commenced searching the car. Marijuana was found in the trunk of the vehicle.

The Petitioner filed, *nunc pro tunc*, a motion to suppress physical evidence on September 9, 1999. The suppression court judge, the Honorable Fred P. Anthony, heard the motion on October 4, 1999.

The issue before the suppression court, as stated by Judge Anthony, was whether the search of Mr. Witherspoon's vehicle violated the United States Constitution under *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.492 (1998). The Commonwealth asserted that the search was legal because Mr. Witherspoon had consented to the search, while Mr. Witherspoon argued that the police could not even ask for consent to search the vehicle because they did not have articulable facts that something illegal was going on.

As Judge Anthony explained, in *Knowles* police officers searched a vehicle pursuant to a grant of authority under Iowa law. The officers found marijuana and paraphernalia and arrested the defendant. The defendant moved for suppression of the evidence which motion was denied by the trial court. The Supreme Court of Iowa affirmed that decision. This Court granted certiorari and reversed, determining that a search incident to an arrest is allowable under the U. S. Constitution for two reasons: to protect the officer making the arrest; or to preserve evidence for later use at trial. This Court held that neither rationale was available to the officer issuing a routine traffic citation.

Applying the law of *Knowles* to the case before him, Judge Anthony found that the officer did not have the authority to search the vehicle in question. He had already issued the citation and could show no other reason to justify the search. The Judge could not agree with the Commonwealth that, because the search was pursuant to Mr. Witherspoon's consent, *Knowles* was inapplicable. Consent was unnecessary in *Knowles*, the court stated, because of the state of the Iowa law. As this Court had determined that the statutory consent did not make the search valid in *Knowles*, Judge Anthony determined that there was no reason to treat Mr. Witherspoon's actual consent differently than the statutory consent in *Knowles*. Because the officer did not have reason to suspect that there

was illegal activity present in the case before him, Judge Anthony granted the motion to suppress.

The Superior Court of Pennsylvania disagreed that *Knowles* was controlling. The court noted that police-citizen encounters constitute either mere encounters, or investigative detentions, or custodial detentions. Interactions beyond mere encounters require that the police possess reasonable suspicion or probable cause that the citizen is engaged in criminal activity. The assessment of the level of interaction, the court noted, requires consideration of all the circumstances surrounding the encounter in order to determine whether the police conduct would have communicated to a reasonable person that he was not free to decline the officer's request or to terminate the encounter. If all the circumstances indicate the person understood he was free to leave and not cooperate, the officer may engage a citizen in a mere encounter without a reasonable suspicion of criminal activity.

The superior court noted that Mr. Witherspoon was engaged by the Trooper in an investigative detention based on his driving in excess of the speed limit and was issued a citation by the Trooper. The questions then became whether there could be a continued detention subsequent to the issuing of the citation without any other indication that additional criminal activity was afoot.

Pennsylvania law, the court stated, conditions the answer on whether the officer first informed the detainee that he was free to leave. Where the officer requests a consent to search prior to returning the detainee's license and other paperwork, continued detention constitutes an unreasonable Fourth Amendment seizure. On the other hand, where the officer first returns the license and paperwork and then requests a consent to search and informs the detainee he is free to leave, a reasonable person would be given to understand that he was at liberty to ignore the officer and leave. Thus, the investigative

detention is converted into a mere encounter and the officer would require neither reasonable suspicion nor probable cause to foster the contact. As long as the detainee knows he is not bound to answer the officer's questions, he may voluntarily consent to a valid search.

In the case of Mr. Witherspoon, the superior court noted that it was uncontested that the Trooper first returned his license and other paperwork and informed him that he was free to go. Thereafter, he consented to the search of the vehicle and the marijuana was discovered. These facts, the court held, constituted a constitutionally valid search following from a mere encounter. Therefore, the court concluded that the suppression court erred in granting the motion to suppress and it reversed and remanded for a trial.

On April 18, 2001, the Pennsylvania Supreme Court denied Mr. Witherspoon's Petition for Allowance of Appeal. This Petitioner for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The actual Pennsylvania legal doctrine constraining the Superior Court at the time it reversed the suppression court judge's ruling that *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed. 2d 492 (1998)[hereinafter, "Knowles"] requires suppression of the fruits of Petitioner's alleged "consent search" is the doctrine set forth in *Commonwealth v. Cleckley*, 558 Pa. 517, 738 A.2d 427 (1999) [hereinafter, "*Cleckley, supra*"].

While the Superior Court panel that decided Petitioner's case did not, in its unpublished Memorandum Opinion, cites *Cleckley, supra*, it did cite *Commonwealth v. Hoak*, 549 Pa.Super. 173, 700 A.2d 1263 (1997) affirmed without Opinion by an equally divided Court at 557 Pa. 496, 734 A.2d 1275 (1999) [hereinafter, "*Hoak, supra*"].

Hoak, supra, in turn, did apply the doctrine later announced in *Cleckley, supra*, (although the Superior Court

filed its Opinion on August 12, 1997 before *Cleckley, supra,* and *Witherspoon, supra,* were decided) to reach its result that a "mere encounter" was not converted to an "investigative detention" by a police request that "some questions" be answered. 700 A.2d at 1265.

Despite this admittedly confusing case law situation, created by the panel's failure to mention or cite *Cleckley, supra,* the legal doctrine that prevents Mr. Witherspoon from obtaining relief, and did so when Judge Anthony ordered suppression, is that of *Cleckley, supra.* In other words, if and only if the rule of *Cleckley, supra,* is constitutional, Judge Anthony erred in his interpretation of *Knowles, supra.*

In *Cleckley, supra,* only Mr. Justice Nigro dissented, since he believes that when police seek consent to perform an otherwise unconstitutional search, they should be required under Article I, Section 8 of the Pennsylvania Constitution to expressly advise the subject of the search that he or she has the right to refuse to give consent and that any refusal will be respected.

Thus, intervention by this Court, through an exercise of its Certiorari jurisdiction, is urgently required because clearly erroneous Pennsylvania case law at present is tantamount to being an open invitation to police "fishing expeditions" or even to being an encouragement to those officers and police departments who desire to employ "profiling" in their highway-sited work.

Pennsylvania consent to search is, in reality, a waiver of one's rights under Article I, Section 8 of the Pennsylvania Constitution and under the Fourth Amendment to the United States Constitution. Consequently, for such a waiver to be valid any prosecutor should be required to demonstrate an "intentional relinquishment or abandonment of a known right or privilege," as it must for waivers of other constitutional rights. *See, e.g., Commonwealth v. Garrett,* 439 Pa. 58, 59, 266 A.2d 82, 83 (1970); *Commonwealth v. Norman,* 447 Pa. 217, 221, 285 A.2d 523, 526 (1971); *Commonwealth v.*

Vega, 553 Pa. 255, 260, 719 A.2d 227, 230 (1998). As the Pennsylvania Supreme Court has stated,

> Regarding any rights guaranteed by either the United States Constitution or the Pennsylvania Constitution, for a waiver of those rights to be valid, the Commonwealth must prove by a preponderance of the evidence that the alleged waiver was intelligently made. Before finding a valid waiver, we must be convinced that an accused knows the nature of the constitutional rights involved.

Commonwealth v. Coleman, 477 Pa. 400, 383 A.2d 1268, 1271 (1978) (citations omitted).

The *Cleckley* majority found, however, that this analysis is inapplicable to one's waiver of his or her rights under the Fourth Amendment of the United State Constitution and under Article I, Section 8 of the Pennsylvania Constitution to be free from unreasonable searches and seizures.

The majority in *Cleckley* relied on a case handed down by this Court in 1973: *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). However, the holding of this Court in Schneckloth was very different from the holding in *Cleckley*, challenged via the instant Petition. The former—expressed in an Opinion by Mr. Justice Stewart, in which Chief Justice Burger, and Justices White, Blackman, Powell and Rehnquist joined—was that the Fourth and Fourteenth Amendments to the United States Constitution do not require an express suppression court determination that the alleged "consenter": " . . . had *known* that his consent could have been withheld and that he could have refused to have his vehicle searched . . . ." [Emphasis in original]. 412 U.S. at 222, 93 S.Ct. at 2045, 36 L.Ed2d at 859.

Petitioner asserts that, in light of *Knowles'* renewed and improved insight into and understanding of Fourth

Amendment constraints which apply to traffic stops and their *sequelae*, the majority in *Cleckley, supra*, erred in its interpretation of what, as per *Bustamonte, supra*, is permitted by the Fourth Amendment to the United States Constitution. In addition, the majority erred in concluding that a person's alleged "consent" to search is valid under the Pennsylvania constitution even when the subject of the search is stipulated to believe he or she has nothing to gain by withholding consent to a proposed search and that any illegality in the impending search would definitely not prevent conviction, or ameliorate punishment, in connection with any contraband found.

Given the Pennsylvania Supreme Court's consistent determination that Article I, Section 8 of the Pennsylvania Constitution affords broader privacy rights than those provided by the Fourth Amendment, its holding in *Cleckley, supra*, necessarily implies that the Court deems its doctrine consistent with the Fourth Amendment.

In other words the *Cleckley* doctrine is much broader than one that requires—appropriately—that great deference be given to fact-finding by a suppression court judge where the fact to be found is whether (considering the totality of the circumstances) there was consent-in-fact after an otherwise lawful and complete, traffic stop. In *Schneckloth, supra*, this Court was merely defending the unique and expert fact-finding capacity of the trial-level (as opposed to the appellate-level) judge.

The *Cleckley* doctrine is that, as a matter of law, there can be a lawful search even when it is stipulated, beyond all doubt, that the "consenter" knowingly is concealing criminal contraband and believes that a refusal would not be of any value to him or her, since an unchallengeable involuntary search is otherwise inevitable.

Thus, the "consent" announced judicially in *Cleckley, supra*, is no different than the "search incident to citation" rule announced by the Iowa legislature in the statute

overturned by this Court in *Knowles, supra.* That statute presumably was posited upon the legal fiction that one who drives upon a state's roads "consents" to whatever vehicle-related substantive law and legal procedure there and then exist.

Both types of "consent" are legal fictions. Neither type of consent is true consent. More importantly, motor vehicle searches pursuant to such "consent" violate the Fourth Amendment to the United States Constitution.

The Superior Court reversed Judge Anthony based upon a determination that then current Pennsylvania case law does not conflict with Knowles. Opinion, Appendix B, pp. 2a - 8a, inclusive. Judge Anthony concisely identified the fatal flaw in then applicable Pennsylvania case law doctrine (not, of course in as much detail as it set forth herein) by noting that no discernable difference exists between the "consent" in Knowles and that deemed adequate under Pennsylvania case law. Opinion, Appendix C, p. 11a. As a result, no findings of fact were made, and no "totality of the circumstances" analysis was done. Why? Because Pennsylvania case law has degenerated to the point that the legal situation at Pennsylvania traffic stops is no different than the legal situation which the Iowa legislature sought to produce when it passed the statute overturned by this Court in Knowles.

Cleckley, supra, represents a determination that the state and federal constitutions sanction a person's relinquishment of the right to refuse consent when he has no knowledge of such a right's existence.

In reality *Knowles, supra,* and innumerable other judicial decisions stand for the proposition that the United States constitution and common sense require that a person be aware of his or her rights before any waiver to those rights is constitutionally validated. *See, e.g., Commonwealth v. Gibson,* 536 Pa. 123, 132, 638 A.2d 203, 207 (1994) ("the subject

of the search must be made aware of his rights against a warrantless search for a waiver to be intelligent").

The words of the New Jersey Supreme Court in *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975) are particularly apt here;

> . . . where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent. Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. One cannot be held to have waived a right if he was unaware of its existence.

Mr. Justice Marshall's words are as compelling in the year 2001 as they were in the year 1973: "under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law". *Schneckloth, supra*, 412 U.S. at 288. If a person believes he has no choice but to consent upon an officer's request, then that person's consent cannot be said to have been given voluntarily, much less knowingly and intelligently. The Pennsylvania judge-made law, no less than the Iowa legislature-made law, vitiates this fundamental doctrine in one of the situation-types most vulnerable to Fourth Amendment violations via "fishing expeditions" and "profiling": The motor vehicle traffic stop is perhaps the kind of situation where it is most likely that the true police objective will be to discover more serious crimes than violations of the Motor Vehicle Code.

Petitioner concedes that *Knowles* does not necessarily require--as part of the "totality of the circumstances" standard-- even a simple statement by the police that the subject of the search has the lawful right to withhold consent to search. While such a requirement would serve to protect not only those who are unaware of their rights, but also those who, although perhaps aware of their rights, become too intimidated to refuse what can readily be perceived as an official demand, it is not contended that Knowles applies to compel such a statement. What Knowles does require is the opportunity to prove to a suppression court judge that no true voluntary relinquishment of a known right to refuse permission to search took place out on the lonely highway at the traffic-stop site.

See McGlaughlin, David, "Consent Searches and Knowledge of the Right to Refuse," 12 Search and Seizure Law Report 1:93, 99 (January 1985). See also, Dery, George M., III, *"When Will This Traffic Stop End?": The Unites states Supreme Court's Dodge of Every Detained Motorist's Central Concern - Ohio v. Robinette*, 25 Fla. St .U. L. Rev. 519; and Salken, Barbara C., *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L.Rev. 221, 258-59 (1989).

The result in *Knowles, supra,* is a narrow application of its broader holding. The holding compelled overturning the Iowa statute there in question, but it was interpreted in an overly narrow manner by the Superior Court, which deemed it inapplicable because the instant case involves a particular request for consent during a traffic stop, and non-refusal, whereas *Knowles, supra,* involved an Iowa statute which provided for a broad "search incident to citation". . Opinion, Appendix B, pp. 2a - 8a, inclusive.

The true breadth of *Knowles* is illustrated by *U.S. v. Johnson*, 170 F.3d 708, 714, 716 (7th Cir. 1999). The court of appeals applied Knowles to a non-motor-vehicle situation

where police conducted searches of apartments in a particular building, after stops of persons exiting the building, based only on generalized suspicion regarding the person and/or apartments and not reasonable suspicion. 170 F.3d at 714. The court concluded that " the officers were in essence conducting a general search in the hopes that something would turn up—the very kind of search the Fourth Amendment was designed to regulate." *Id.* The court also noted that, in truth, *Knowles, supra,* stands for the proposition that legitimate concern for officers' safety when they make traffic stops does not justify any and all tactics, adding: "It would be incompatible with the thrust of Knowles to find that random seizures outside of homes are permissible, when searches incident to traffic stops are not." *Id. at 716.* Thus, *Knowles, supra,* was interpreted as rendering all (in effect) "searches incident to traffic stops" impermissible, and not just universal "searches incident to traffic stops" expressly authorized by a statute. This is interpreting *Knowles, supra,* as sweeping much broader than the narrow construction which the panel in the Petitioner's case attributed to *Knowles, supra.* Even if it were to be concluded that *U.S. v. Johnson, supra,* attributes a too-broad sweep to *Knowles, supra,* it nonetheless shows that its sweep is much broader than that attributed to it by the Superior Court panel.

Moreover, the conflicting "readings" of *Knowles, supra,* in the instant case and in *U.S. v. Johnson, supra,* illustrate that *Knowles* in fact is causing confusion among the lower Courts--and error--as to its meaning. This is another reason why grant of Certiorari be appropriate. Doing so would remedy an important problem among the Courts--and on our highways and byways.

Similarly, in *U.S. v. Pruitt,* 174 F3rd 1215, 1218, 1221 (11th Cir. 1999), *Knowles, supra,* was applied to reach a "canine sniff search"--a methodology that has been held not even to be a true Fourth Amendment search. 174 F.3rd 1215, 1218, 1221 (11th Cir. 1999). In *Pruitt, supra,* a traffic stop was

unnecessarily and unusually lengthened (after the driver withheld consent-to-search) in order to makes possible deployment of a drug-sniffing dog. The dog eventually detected a substantial quantity of marijuana. 174 F. 2d at 1218. The court of appeals applied Knowles's holding to invalidate police conduct in obtaining evidence, not through involuntary searches, but through the type of misconduct made possible by the tremendous aura and reality of unchecked police power at the site of a traffic stop. In *Pruitt, supra,* it was the deliberate extension of the duration of otherwise legitimate traffic-stop processing, that was held to have violated the Knowles rule. Thus, *Pruitt, supra,* is another demonstration that: 1) Knowles's holding was too narrowly interpreted by the Superior Court in Petitioner's case; and 2) case law is developing numerous mutually inconsistent variants as to Knowles's meaning.

The specific Iowa Statute invalidated in Knowles authorized automobile searches incident to issuance of citations for speeding.

The Opinion of this Court was authored by Chief Justice Rehnquist who, interestingly, joined in the majority Opinion in Schneckloth and was the only member of this Court who was then a member of this Court.

Knowles was stopped for speeding in Newton, Iowa, after he had been clocked driving 43 miles per hour on a road where the speed limit was 25 miles per hour, and issued him a citation rather than arresting him. The officer then conducted a full search of the car, without consent or probable cause, found marijuana and a "pot pipe," and arrested Knowles. The state law gave officers authority to conduct a full- blown search of an automobile and driver where they issue a citation instead of making a custodial arrest. Knowles was convicted for possession of a controlled substance and keeping a controlled substance in an automobile.

The Iowa Supreme Court applied its bright-line "search incident to citation" exception to the Fourth Amendment's warrant requirement. Thus, *Knowles, supra,* factually did not implicate a suggestion of actual consent.

A unanimous United States Supreme Court held that the state-law-authorized search nonetheless violated the Fourth Amendment since policy justification was not present in a quantum sufficient to justify the authorized searches. The Court noted that the threat to officer safety from issuing a traffic citation is a good deal less than in the case of a custodial arrest, and that, while concern for safety during a routine traffic stop may justify the "minimal" additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search. 524 U.S. at 117, 119 S.Ct. at 488, 142 L.Ed.2d at ___.

The Court went on to note that, even without the search authority Iowa urged, officers have other, independent bases for searches for weapons to otherwise protect themselves from danger; and that the need to discover and preserve evidence does not exist in a traffic stop. For example, once Mr. Knowles was stopped for speeding and issued a citation, all evidence necessary to prosecute that offense had been obtained. Iowa's argument that a "search incident to citation" is justified because a suspect may try to hide evidence of his identity or of other crimes was deemed unpersuasive, since an officer may arrest a driver if he is not satisfied with the identification furnished, and the possibility that an officer would stumble onto evidence of an unrelated offense seems remote. Id.

According to this Court the question presented was whether a "search incident to citation" procedure authorizes an officer, consistently with the Fourth Amendment, to conduct a full search of a car.

Just as the entire Iowa statute was overturned, and not just the specific Knowles search based upon it, this Court

should overturn the entire *Cleckley* doctrine which prevented affirming Judge Anthony's decision.

The police officer in *Knowles* conceded that he had neither Knowles' consent nor probable cause to conduct the search. He relied on Iowa law dealing with such searches.

Schneckloth, supra, was based on the Fourth Amendment to United States Constitution. Petitioner urges in the alternative that Certiorari should be granted on the additional and/or alternative ground that Schneckloth is no longer "good law" in light of the renewed and improved insight into and understanding of the constraints by the Fourth Amendment on police who desire to avoid the risk of refusal of a warrant application by asking for a so-called "consent search". A "consent search" is not even a real "Fourth Amendment" search at all, being no different than a consent search by anyone, be they a hostile agent of the government or otherwise. The *Cleckley* doctrine, may well import the "current understanding" (which, unfortunately, is incorrect) of *Schneckloth, supra.* If so, it is the importantly deleterious confusion as to the correct construction of *Schneckloth, supra.* for which review is sought in the instant proceeding.

CONCLUSION

For the reasons adduced above, this Court should grant certiorari in the instant case and reverse the decision of the court below.

Respectfully submitted,
/s/Joseph P. Burt.
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APPENDIX

APPENDIX A - ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, DATED APRIL 18, 2001

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	: No. 0457 W.D. Alloc. Dkt. 2000
v.	: Petition for Allowance of Appeal from the
HENRY L. WITHERSPOON, Petitioner	: Order of the Superior Court

ORDER

PER CURIAM:

AND NOW, this 18th day of April 2001, the Petition for Allowance of Appeal is hereby **DENIED**.

A True Copy Patricia Honard
As of: April 18, 2001
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX B - OPINION AND ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA, WESTERN DISTRICT, DATED JULY 3, 2000

2000 PA Super 189

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA,
v.	:	
HENRY L. WITHERSPOON, Appellee	:	No. 1784 WDA 1999

Appeal from the ORDER October 13, 1999, in the Court of Common Pleas of ERIE County, CRIMINAL, No. 652 of 1999.

BEFORE: KELLY, FORD ELLIOTT, and OLSZEWSKI, JJ.

OPINION BY OLSZEWSKI, J:

This is an appeal by the Commonwealth from the suppression court's order dated October 13, 1999, granting Henry Witherspoon's motion to suppress evidence seized by the Pennsylvania State Police. We reverse and remand for a trial.[1]

When we review the Commonwealth's appeal from the decision of the suppression court, "[we] consider only the

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[1] The Commonwealth has certified that the suppression order would substantially handicap or effectively terminate its prosecution of this case. This permits appellate review of the suppression order. *See Commonwealth v. Matis*, 710 A.2d 12, 17 (Pa. 1998)(quoting *Commonwealth v. Dagger*, 486 A.2d 386 (Pa. 1985); *Commonwealth v. Pitts*, 740 A.2d 726, 732 (Pa. Super. 1999).

evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted." *Commonwealth v. Nester*, 709 A.2d 879, 880-81 (Pa. 1998). "When the evidence supports the suppression court's findings of fact . . ., this Court may reverse only when the legal conclusions drawn from those facts are erroneous *Commonwealth v. Valentin*, 748 A.2d 711, 713 (Pa.Super. 2000). The suppression court provided a concise restatement of facts:

> Defendant was driving a rented vehicle on Interstate 90 on December 7, 1998. The Defendant was from Michigan and was returning from a trip to New York City. The Defendant was stopped by the police for speeding and because the officer stated that Mr. Witherspoon appeared to be underage. After being stopped, it became apparent that the Defendant was legally old enough to drive but was not licensed either in Michigan or elsewhere. The officer issued a citation for driving without a license and then asked the Defendant to consent to a search. The Defendant consented and the vehicle was searched. The police found marijuana in the trunk of the vehicle. Defendant was charged with Possession, Possession With Intent to Deliver, and Possession of drug paraphernalia. The Defendant filed the above motion *nunc pro tunc* on September 9, 1999. The Court held a hearing on the matter on October 4, 1999.

Trial Court Opinion, 10/13/99, at 1-2 (footnote omitted). Before proceeding, we are compelled to include several facts omitted from the suppression court's factual summary. Appellee was traveling west on Interstate 90 where Trooper Rogers clocked him going 62 mph in a 55 mph zone. See

N.T. Suppression Hearing, 10/4/99, at 4. Trooper Rogers testified that he stopped appellee due to a combination of speeding and appellee's apparent age. *See id.* at 5. He further testified that during the stop he noticed a contraband copy of "Enemy of the State" in the back window of the car.[1] *See id.* at 7, 9, 25. After issuing appellant a citation for driving without a license, Trooper Rogers returned appellee's identification card and paperwork to him and informed him that he was free to leave. *See id.* at 9, 14, 24. Before appellee could drive away, Trooper Rogers asked him if he would consent to a search of the car. *See id.* at 9. Appellee then signed a consent form. *See id.* at 9-10, 31. Several more troopers arrived at the scene and commenced searching appellee's car. *See id.* at 31-34.

The Commonwealth raises the following issue for our review:

> WHETHER THE SUPPRESSION COURT ERRED AND MISAPPLIED THE LAW BY ANALYZING THIS CASE UNDER AN INAPPLICABLE U.S. SUPREME COURT DECISION AND FAILING TO REALIZE THAT THE VOLUNTARY CONSENT TO SEARCH WAS LEGALLY OBTAINED.

Appellant's Brief, at 4.

The suppression court relied upon the recent United States Supreme Court case *Knowles v. Iowa*, 525 U.S. , 142 L.Ed.2d 492 (1998), for the proposition that one can never validly consent to having his car searched, subsequent to being stopped for speeding, without reasonable suspicion or probable cause. See Trial Court Opinion, 10/13/99, at 3. The court wrote that "[w]hile there was no consent given in *Knowles*, the officer did not need consent as he had statutory consent to search the vehicle. The Supreme Court

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[1] This movie had not yet been released for home viewing at the time of the stop.

determined that the statutory consent did not make the search valid and the Court can see no reason to treat the actual consent in this case differently than the statutory consent in *Knowles*." *Id.* at 3. Our reading of *Knowles* leads us to a different conclusion.

In *Knowles*, an Iowa statute permitted a police officer to conduct a full search of an automobile whenever a policeman cited a driver for an infraction of any traffic or motor vehicle code. See *Knowles*, 525 U.S. ___, ___, 142 L.Ed.2d 492, 496-97 (characterizing this as a "search incident to citation"). The Court proceeded to discuss the two constitutionally permissible rationales for conducting a search incident to an arrest: the need to (1) disarm a suspect and (2) preserve evidence for use at trial. *See id.* at , 142 L.Ed.2d at 498. The Court then addressed the inherent differences between placing a suspect under arrest and issuing a citation, and held that the underlying concerns that support searches incident to arrest simply are not present when a police officer issues a citation. *See id.* at , 142 L.Ed.2d at 498-99. Due to the absence of those concerns, the Supreme Court held the Iowa statute unconstitutional. *See id.* at , 142 L.Ed.2d at 499. Our reading of *Knowles*, however, fails to discern any indication that the U.S. Supreme Court has prohibited every search not grounded in either reasonable suspicion or probable cause. As such, *Knowles* is inapplicable to this case and the trial court erred by relying upon it.

Pennsylvania constitutional jurisprudence has developed three distinct types of police-citizen interaction: a mere encounter, an investigative detention, and a custodial detention. *See Commonwealth v. Boswell*, 721 A.2d 336, 339 (Pa. 1998) (citing *Commonwealth v. Ellis*, 662 A.2d 1043, 1047-48 (Pa. 1995)). If the level of interaction exceeds that of a mere encounter, the police must possess either reasonable suspicion or probable cause that the suspect was engaged in criminal activity. *See id.* Our Supreme Court has utilized the following test to assess the level of interaction for particular instances: "a court must consider all the circumstances

surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Commonwealth v. Wilmington*, 729 A.2d 1160, 1172 (Pa.Super. 1999) (en banc) (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). Circumstances to consider include: the number of officers present during the interaction; whether the officer informs the citizen that he is suspected of criminal activity; the officer's demeanor and tone of voice; the location and timing of the interaction; the visible presence of weapons on the officer; and the questions asked. *See Boswell*, 721 A.2d 340. Therefore, if all of the circumstances indicate that a person understood that he was free to leave and not cooperate, a police officer may engage a citizen in a mere encounter without having a reasonable suspicion of criminal activity. *See Commonwealth v. Vasquez*, 703 A.2d 25, 30 (Pa.Super. 1997) (quoting *In re Jermaine*, 582 A.2d 1058, 1060 (Pa.Super. 1990) (citing *Terry v. Ohio*, 392 U.S. 1 (1968))).

Undoubtedly, the initial contact between Trooper Rogers and appellee constituted an investigatory detention, which would require a reasonable suspicion that the suspect had violated a law. See *Boswell*, 721 A.2d at 340; *Commonwealth v. Ellis*, 549 A.2d 1323, 1330 (Pa. 1988) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984)). It is uncontested that Trooper Rogers lawfully detained appellant for exceeding the maximum speed limit, a violation of 75 Pa.C.S.A. § 3361. See *Commonwealth v. Pless*, 679 A.2d 232, 233 (Pa.Super. 1996). The question then arises as to whether the police may continue to detain a citizen subsequent to issuing a citation or warning without any other indication that additional crimes were afoot.

Pennsylvania jurisprudence conditions the answer upon whether the police officer first informs the detainee that he or she is free to leave. In *Commonwealth v. Lopez*, 609 A.2d 177 (Pa.Super. 1992), prior to returning his license, registration, and car rental agreement, the police continued

to question Lopez and finally asked him if he would consent to a search. This Court found that Lopez was not free to leave as he could not do so legally,[1] and held that the continued detention constituted an unreasonable Fourth Amendment seizure. *See id.* at 182; see also *Commonwealth v. Parker*, 619 A.2d 735 (Pa.Super. 1993). $10 The courts, however, have reached an opposite conclusion when the police officer asks the detainee to consent to a search if the officer first returns the detainee's paperwork and informs him that he is free to leave. *See Commonwealth v. Hoak*, 700 A.2d 1263 (Pa.Super. 1997) (en banc), *aff'd by an equally divided court*, 734 A.2d 1275 (Pa. 1999). Whenever the surrounding circumstances indicate that police conduct would have communicated to a reasonable person that he was at liberty to ignore the police presence and go about his business, the investigative detention converts into a mere encounter with all of its attendant consequences. *Commonwealth v. Prosek*, 700 A.2d 1305, 1309 (Pa.Super. 1997) (citing *Hoak*, 700 A.2d at 1268). One consequence of a mere encounter is that neither reasonable suspicion nor probable cause is required to foster the contact. As long as the detainee knows that he is not bound to answer the police officer's questions, he may voluntarily consent to a valid search.

In the instant case, the record contains uncontested evidence that Trooper Rogers first returned the paperwork and identification to appellee and informed him that he was free to leave. Appellee then consented to a search of the vehicle that revealed controlled substances. We find that these facts constitute a constitutionally valid search flowing from a mere encounter. Accordingly, the trial court erred in suppressing the evidence.

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[1] The police still held his paperwork.

Order reversed, case remanded for a trial. Jurisdiction relinquished.

Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

Date: July 03, 2000

APPENDIX C - OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF THE SIXTH JUDICIAL DISTRICT OF PENNSYLVANIA DATED OCTOBER 13, 1999

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA**
v.	:	
HENRY L. WITHERSPOON,	:	
Defendant	:	**No. 652 of 1999**

OPINION

Anthony, J., October 13,1999.

This matter comes before the Court on Defendant's Motion to Suppress Nunc Pro Tunc. After reviewing the Motion, listening to the testimony presented in the hearing and considering the arguments of counsel, this Court will grant the motion. The factual and procedural history is as follows.

Defendant was driving a rented vehicle on Interstate 90 on December 7, 1998. The Defendant was from Michigan and was returning from a trip to New York City. The Defendant was stopped by the police for speeding and because the officer stated that Mr. Witherspoon appeared to be underage. After being stopped, it became apparent that the Defendant was legally old enough to drive but was not licensed either in Michigan or elsewhere. The officer issued a citation for driving without a license and then asked the Defendant to consent to a search. The Defendant consented and the vehicle was searched. The police found marijuana in the trunk of the vehicle. Defendant was charged with Possession, Possession With Intent to Deliver, and

Possession of drug paraphernalia. Defendant filed the above motion *nunc pro tunc* on September 9, 1999. The Court held a hearing on the matter on October 4, 1999.[1]

The issue before the Court is whether the search of the vehicle the Defendant was driving violates the United States Constitution under *Knowles v. Iowa*, 97-7597 (U.S. 1998). The Commonwealth asserts that the search was legal due to the consent of the Defendant to the search. Defendant asserts that the police could not even ask for consent to search the vehicle because they did not have articulable facts that something illegal was going on.

Knowles is a recent Supreme Court decision from 1998. In that case, the defendant was stopped for speeding in Iowa. *Id.* Pursuant to a grant of authority from Iowa law, the police officer searched the vehicle.[2] The officers found marijuana and a "pot pipe" and arrested the Defendant. *Id.* The defendant moved for suppression of the evidence which was denied by the trial court and that decision was affirmed by the Supreme Court of Iowa. The Supreme Court of the United States granted certiorari and reversed.

The Supreme Court determined that a search incident to an arrest is allowable under the U. S. Constitution for two reasons. *Id.* First, a search incident to an arrest is allowable because there is a need to protect the officer making the arrest. *Id.* The other reason to allow searches

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[1] Defendant filed his motion *nunc pro tunc* because he believed that the charges against him would be dropped like the charges against he co-defendant. The Commonwealth had no objection to the motion.

[2] Iowa Code Ann. §321.485(1)(a) (West 1977) allowed police officers to arrest any individual the police officer had reason to believe was violating "any traffic or motor vehicle equipment law." Iowa law also allowed the officer to issue a citation which "does not affect the officer's authority to conduct an otherwise lawful search." Iowa Code Ann. §805.1(4). The Iowas courts have held that this allows the police to search vehicles and drivers in cases where the police do not make an arreat but only issue a citation. *Knowles, supra* at 2.

incident to an arrest is the preservation of evidence for later use at trial. *Id.* The Supreme Court held that neither rationale is available to the officer issuing a routine traffic citation. *Id.*

Applying the law of *Knowles* to the present case, the officer did not have the authority to search the vehicle in question. He had already issued the citation and could show no other reason to justify a search of the vehicle. The Commonwealth contends, however, that the search was pursuant to the Defendant's consent and Knowles is inapplicable. This Court does not agree. While there was no consent given in Knowles, the officer did not need consent as he had statutory consent to search the vehicle. The Supreme Court determined that the statutory consent did not make the search valid and the Court can see no reason to treat the actual consent in this case differently than the statutory consent in *Knowles*.

Therefore, since the officer did not have reason to suspect that there was illegal activity present in the case *sub judice*, the Court will grant the motion.

/s/ Fred P. Anthony J.

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS**
	:	**OF ERIE COUNTY,**
v.	:	**PENNSYLVANIA**
	:	
HENRY L. WITHERSPOON,	:	
Defendant	:	**No. 652 of 1999**

ORDER

AND NOW, to-wit, this 13th day of October, 1999, it is hereby ORDERED and DECREED that Defendant's Motion to Suppress Nunc Pro Tunc is GRANTED.

BY THE COURT:

/s/Fred P. Anthony, J.

C: Office of District Attorney
A. J. Adams, Esquire

APPENDIX D - TRANSCRIPT OF THE SUPPRESSION HEARINGHELD OCTOBER 4, 1999, IN THE COURT OF COMMON PLEAS FOR THJE SIXTH JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS**
	:	**OF ERIE COUNTY,**
v.	:	**PENNSYLVANIA**
	:	
HENRY L. WITHERSPOON,	:	
Defendant	:	**No. 652 of 1999**

SUPPRESSION HEARING

Proceedings held before the Honorable Fred P. Anthony, Courtroom F, Erie County Courthouse, Erie, Pennsylvania, on Monday, 4 October 1999, commencing at :10:55 a.m.

APPEARANCES: DAMON C. HOPKINS, Assistant District Attorney, appearing on behalf of the Commonwealth.

A. J. ADAMS, Attorney at Law, appearing on behalf of the Defendant.

Nancy R. Sheldon, RMR
Official Court Reporter

THE COURT: Commonwealth, are you ready to proceed?

MR. HOPKINS: Thank you, Your Honor. We would call Trooper Rogers.

JAMES R. ROGERS having been first duly sworn, Was examined and testified as follows:

DIRECT EXAMINATION BY MR. HOPKINS:

Q Would you state your name for the court reporter?

A James R. Rogers, the Pennsylvania State Police.

Q How long have you been with the Pennsylvania State Police?

A I've been employed by the Commonwealth since December of 1988.

Q And as a trooper, can you tell us briefly what your duties include?

A My main duties -- I am the community service officer right now. My main duties are going into the schools and dealing with kids, teaching them about drugs and alcohol.

THE COURT: That's not going to help us any. Let's get on.

BY MR. HOPKINS:

Q How long have you been the community service officer?

A Going on seven years.

Q Do you also do patrols?

A On occasion.

Q And in December of 1998 did you do patrols?

A Yes, I was.

Q Do you remember December 7, 1998?

A Yes, I do.

Q Where were you working that day?

A I was community service officer. I had finished my details I was doing in the morning so I went up on the interstate to run radar.

Q Where were you positioned on the interstate?

A At the Exit 7 interchange monitoring-traffic that was headed westbound.

Q Did you make any stops that day?

A Yes, I did.
Q And did any of those stops involve Henry Witherspoon?
A Yes, they did.
Q Can you tell us about that?
A I was observing traffic traveling in the westbound direction, and a vehicle went by me traveling 62 miles per hour. As the vehicle went by me, the operator was slumped down in his seat. He appeared to me as he went by to be a juvenile. As the vehicle went by, I looked at the plates and observed they were Michigan plates, and I pulled out and stopped the operator approximately 2.2 of a mile from Exit 6.
Q Let's go back. Is it unusual for to you see people going by at 62?
A Not at all.
Q Do you generally stop people going 62 in a 55?
A. No, I don't.

THE COURT: You shouldn't publicize that.

BY MR. HOPKINS:
Q Trooper Rogers, in this case what was the other factor then beyond the speed?
A The factor was his age when he went by me. It appeared to be a juvenile who was operating the vehicle, and to me I wondered on a weekday what a juvenile was doing operating this vehicle.

THE COURT: What was the speed limit?

THE WITNESS: 55.

BY MR. HOPKINS:
Q Did you see any other passengers in the car when they went by?

A To be honest with you, I can't remember if I saw any other passengers. Once I got up to the vehicle, I observed the other passengers.
Q You indicated that the individual was slumped down. How much of him could you see as he passed by you?
A I was able to see his head.
Q Just his head?
A Yes.
Q Is that one of the reasons you thought he was maybe underage?
A Yeah, that would go along with it.
Q Could you see any facial features?
A No.
Q You couldn't tell if there was facial hair or anything like that?
A No.
Q When you pulled the car over, what happened?
A When I pulled the car over, I approached the vehicle and asked the operator for his driver's license, to which he did not have one. He had a Michigan I.D. card. I brought him out and I spoke to him about the circumstances regarding him not having a driver's license, and I told him he could go back to the vehicle. I also had the passenger come out and I spoke to him, because Mr. Witherspoon advised me that Mr. Davis, who was the front seat passenger, is actually the one who was driving, but he was tired and Mr. Witherspoon took over for him.
Q Did Mr. Davis indicate whether he knew Mr. Witherspoon didn't have a license when he let him drive?
A I asked him if he knew it, and he said he did not know.
Q When you had Mr. Witherspoon out of the vehicle, where did you take him to?
A To the back between my vehicle and his.
Q Did he have registration for the car?
A There was a rental agreement.

Q And that was provided to you?
A It was.
Q Did you notice anything else about the car?
A After I had told him he could go back to his vehicle, when I went back to my vehicle I observed on the rear window ledge a video cassette box, and it contained the movie "Enemy of the State," which I knew was laying in the theaters right now and was not out in videotape yet.
Q And that movie was currently you had to-go to the moviesand see it?
A It was playing in movies like Tinseltown.
Q When you came back, did you say anything to Mr. Witherspoon about the tape?
A He advised me that they bought it from a vendor in New York City.
Q Did you seize the tape or anything at that time?
A I had taken the tape to look at, but I gave it back to him.
Q At what point did you decide whether you were going to cite him or not?
A Well, when he didn't have his driver's license and I knew I was going to be citing him for driving without a driver's license. So when I was releasing him to go back to my vehicle, I knew I was going to cite him.
Q Did you cite him for speeding?
A No. As I said, it was a minor violation and I wasn't going to write a citation for that.
Q Did you write a warning for that?
A No.
Q Did you give him a verbal warning?
A Yes, I did.
Q When you did write the citation, what did you use for your informational purposes if he didn't have a drive`r's license?
A He had provided me with a name and birth date and I ran it through our computer. He also had an I.D. card at that time.

Q Everything matched with that?
A Yes.
Q At that point what did you do?
A I went back and I wrote him up a citation, and then I got him out of his vehicle and brought him back to my vehicle. We talked about the videotape he had in there and I provided him with his copy of the driver's license, gave him all his information back, including the rental agreement. Also I had Mr. Davis's driver's license. I gave it back to him and I told them they were free to leave.
Q What about that videotape?
A That was also given back to him.
Q You told them they were free to leave?
A Yes, I did.
Q What happened next?
A I advised him he was free to leave and I asked him if he would mind answering a couple questions for me. At that point I asked him again about the video he had in the car, asked him if he had any others, asked him if he had any drugs or weapons or anything in the vehicle.
Q What did he respond to those questions?
A He replied no, he didn't.
Q What did you do next?
A I asked if he would give consent to search his vehicle.
Q Did you explain what you were looking for?
A Yes. In fact, he signed a consent form explaining that we were looking for drugs, narcotics, weapons, fruits of the crime.
Q And did you explain to him that he was free to refuse the consent to search?
A He read the consent and signed it. The fact that he did read it, and it's stated very clearly in the consent they do have the right to refuse.
Q All right. I'd like to show you what I've marked as Suppression Exhibit A. This has both what I'll present as the consent to search and something else that I'll move in in

just a moment.

THE COURT: All right.

BY MR. HOPKINS:
Q On the third page of Suppression Exhibit A, do you recognize that third page?
A Yes.
Q What is that?
A That is the waiver of rights/consent to search that we had filled out at the traffic stop.
Q And did he sign that in your presence
A Yes, he did.
Q Trooper, at that point did you, in fact, search the vehicle?
A Yes, we did. I had called for assistance, for backup, when they were doing the search. And Trooper Stetson from Girard barracks arrived, as did Trooper Angelo and Trooper Meredith, but Trooper Meredith left right after the other two patrols were there.
Q Let's move to the trunk of the vehicle. How did you gain access to that?
A We had keys to it.
Q Who gave you the keys?
A The keys were taken from the ignition.
Q Mr. Witherspoon give them to you or did you go in and take them?
A I believe we went in and took them.
Q After?
A After the consent, correct. We searched the interior of the vehicle and then moved to the rear.
Q What did you find in the trunk, if anything?
A When we started moving things around, we had moved a couple duffle bags, I believe they were. Trooper Angelo is assisting with the search, and the carpet was thrown back and there was a brick of suspected marijuana in the rear corner of the vehicle.

Q I assume he was taken into custody at that time?
A Yes.
Q And the other individuals?
A Yes.
Q Do you know if Mr. Witherspoon was ever interviewed and a statement taken from him at the barracks?
A Yes. As I was doing some other things with the evidence, Trooper Angelo interviewed Mr. Witherspoon.
Q Were you present for that interview?
A No, I was not.

MR. HOPKINS: Your Honor, if I could approach again?

THE COURT: Yes.

BY MR. HOPKINS:
Q Trooper, I'll show you Suppression Exhibit A, the first two pages. Do you recognize those first two pages?
A These are statement forms that we use when we're interviewing people.

MR. HOPKINS: Although the trooper wasn't present for this particular statement, Mr. Adams has agreed we can enter it in as a stipulation. This is a statement given by his client.

MR. ADAMS: That's correct.

THE COURT: All right.

BY MR. HOPKINS:
Q Trooper, given that we've now referred to that, could you, with the Court's permission, could you read his statement that was given to Trooper Angelo?

MR. ADAMS: Judge, I would just indicate I don't believe it's relevant to the issues raised in the motion. I know in the

wherefore clause I'm asking that any other evidence obtained as a result of this also be suppressed, but the contents of the statement I don't think are at all relevant to the Court's determination.

THE COURT: Why would they be relevant?

MR. HOPKINS: Your Honor, my understanding, and if I'm incorrect I won't ask him to read it, but my understanding is in addition to Mr. Adams alleging that this was a precursory stop and it was a profile stop, he's also alleged that there was a violation in asking for the consent to search. If I'm incorrect in that, I'll move on.

MR. ADAMS: No, the Knowles case specifically does talk about that. I'm saying that the statement does not seem to be relevant with respect to whether or not he had the right to ask for the consent. That's what Knowles stands for.

MR. HOPKINS: The statement, if read, would establish the defendant himself",-when giving the statement without Trooper Rogers present, indicated that yes, he was given all of his items back and told he was free to leave, at which time he was asked, "Would you mind talking to me? Could I search?" And at which time the defendant in his statement said, "I agreed to let him search because I figured that would make me look like I was being forthright and honest."

THE COURT: You want it admitted just to show the consent was given?

MR. HOPKINS: Yes.

THE COURT: I take it you don't object?

MR. ADAMS: I don't say he's misconstruing Knowles, but obviously Knowles is based upon the fact Trooper Rogers

wouldn't have had the right to ask him for the consent, not what the consent actually

THE COURT: He wants to touch all bases to make sure the consent was covered. Okay.

BY MR. HOPKINS:
Q Trooper, would you go ahead and read the statement? I know it's only about four lines long.
A "I, Mr. Witherspoon, I went on vacation to New York with my friends from Michigan. I brought roughly $0 for my expenses. That's all I had. I knew I needed more but everyone was going to chip in for gas. We was-on the way home. We got pull by police on I-90 west. They discovered weed (marijuana) in the trunk. This was after I got a ticket. Trooper told me I was free to go and then ask would I consent to search. I agreed so they would see I was being cooperative. I wanted to be helpful and, honestly, I didn't buy any dope." Signed, Henry Witherspoon.
Q Trooper Rogers, let's go back to the stop. It's alleged in the suppression motion that this was a pretext and/or a profile stop. Were you up there looking to stop individuals that you thought were drug traffickers?
A I was up there monitoring traffic.
Q And you were, in fact, using your radar gun?
A Correct.
Q Did you come up with any violations on this vehicle before you pulled it over?
A No.
Q So you didn't search for something blocking the plates or looking for registration or pass the vehicle three times to see if there was anything wrong with it?
A No.
Q You simply had it going 62 in a 55?
A Correct.
Q Did you know the race of the individuals when you pulled the car over?

A Yes, I did.
Q Was that a factor at all in your decision to pull the car over?
A No, it was not.
Q Did you know the number of passengers in the car when you pulled it over?
A No, I didn't.
Q Were you -- you were finally made aware of the number of passengers?
A When I approached the vehicle, right.
Q Where were they all seated?
A Mr. Witherspoon was the driver, Mr. Davis was in the front passenger seat, and Mr. McIntosh was sleeping in the rear seat.
Q Were you able to have seen Mr. McIntosh or Mr. Davis when the car went by you?
A I know I didn't see Mr. McIntosh. I'm really not sure if I saw Mr. Davis or not.
MR. HOPKINS: That's all I have, Your Honor.

THE COURT: Cross examine.

MR. ADAMS: Thanks, Judge.
CROSS EXAMINATION

BY MR. ADAMS:
Q Trooper Rogers, could you indicate to the Court the position of your car in relation to the interstate road that you were monitoring?
A You want me to draw a picture for you? I saw you going to the chalk board. I thought maybe that's where you were going.
Q I'll opt for the Court's opinion on that. Is it safe to say you were perpendicular to the lane of traffic you were monitoring?
A Yes.

Q So that when the subject vehicle was coming past you, it was coming from your right to the left?
A Correct.
Q And it's safe to also say that the amount of time that you were able to observe that vehicle was less than five seconds before you decided to pull the vehicle over?
A That's correct.
Q And you weren't pulling the vehicle over for speeding; you were pulling the vehicle over because you believed that the individual driving the car might be underage?
A Well, he went by and he appeared to be underage. The reason for the stop was the violation of exceeding the maximum speed limit, exceeding that by traveling 62 in a 55, mitigating circumstances being the fact that he appeared to be a juvenile driving the vehicle.
Q Are you saying that if the person looked- old like me, that you would have pulled the vehicle over because it was going 62 in the 55 zone?
A That I would not have pulled it over?
Q That you would have pulled it over still, even though the driver was old looking like me?
A If a vehicle went by and there weren't that circumstance -- in fact, it wasn't the first vehicle to go by me traveling that speed so, no, I wouldn't have.
Q Is it safe to say it was the combination of those two factors, or simply because you thought that person was underage?
A It would be a combination of the two, main emphasis being on the fact that he appeared to be underage.
Q Clearly from your perspective, even though you only were able to see it for less than five seconds, you knew that the driver was black?
A Yes.
Q Where exactly was your vehicle in relation to the plane of the subject vehicle? Were you underneath that car

looking up, or were you above that car looking down, or were you even with it?

A You're almost even with it. There's a large embankment there. My vehicle is sitting in the embankment, so when he went by I was able to see him, and he was `upon me as I pulled the radar and I was able to see hint.

Q I take it when you made the observation of what you believed to be a young person driving the vehicle, you might have notified somebody on your radio that you were going to do a stop?

A No.

Q You wait until after the car is pulled over?

A Even then I don't do it. I did the traffic stop and did everything else I needed to until I got to the point I determined there was more there before I called for anybody else.

Q You pulled the vehicle over, and is it safe to say that the vehicle pulled over in a reasonable amount of time from the time that you signaled?

A Yes.

Q And when you did so, you got out of the vehicle and approached the driver's side; is that correct?

A That's correct.

Q When you approached the driver's side, did you have your weapon drawn?

A No.

Q Did you have your -- whatever that little thing is that keeps your gun down -- open?

A No.

Q At that point in time you had not used the radio yet either, I take it?

A Correct.

Q When you approached the driver's side, Mr. Witherspoon was driving?

A Correct.

Q Now, obviously we're going to go on the record here, so this is going to be an obvious question, but all the

individuals in the vehicle were black?
A Correct.
Q Three people?
A Correct.
Q All around the age of twenty-three, I think, at the time?
A Correct. I'm not sure of their ages.
Q Around twenty-two to twenty-three. So when you saw Mr. Witherspoon then, and you'r finally gtting to see him up close, do you still think he's underage when you get to the window and see him?
A You know, I don't know. I went up, and my normal procedure when I pull anybody over is I walk up for a driver's license and registration. So I went to the window and asked to see his driver's license and registration. I really didn't look at him any further to see how old he is.
Q Well, you said the predominant reason why you were pulling this vehicle over was because the driver was underage, correct?
A Correct.
Q As you were approaching the window, common sense would dictate either it's going to confirm your suspicion that the person is underage, or it's going to show you I made an honest mistake and this guy is over sixteen.
A Okay.
Q So when you saw him for the first time up close, didn't you realize that he was, in fact, twenty-three years of age?
A Looking at him right now I'd say, yeah, he looks like He;s not a juvenile, but at that time I don't know because, as I say, my common procedure is to walk up and ask for the license and registration, so it's all intercombined in one thing.

THE COURT: So what you're saying is you really weren't thinking about it anymore?

THE WITNESS: No, I was asking for a license and registration to see how old he was and to get his information.

BY MR. ADAMS:

Q So when you got the identification and the picture on the I.D. looked like Mr. Witherspoon and it said he was twenty-three, did you not conclude, oh, geez, I thought he was under sixteen but obviously he's over?

A Obviously he's over, right.

Q So at that point in time then your predominant reason for pulling him over was the age thing, and that was no longer an issue because he was seven years older than the legal driving age, correct?

A Correct.

Q He didn't have a driver's license?

A Correct.

Q So you were going to write him up for driving without a license?

A Correct.

Q Did you have your book of tickets with you?

A No.

Q Well, you'd have to go back into the vehicle and get that?

A Correct.

Q Is it at that point in time then that you called his identification number through to see if there is any outstanding warrants?

A I got back to my car, I called in to confirm that he didn't have a driver's license.

Q Okay. And to see if there are any outstanding warrants?

A Right.

Q Did you also at that point in time check the identification of the passenger in the front seat and the passenger in the back seat?

A I had collected the identification of the person in

the passenger seat prior to going back to my car to make sure there was a licensed driver in the vehicle.
Q Did you cause those individuals to leave the car while you were doing that before you went back?
A I had Mr. Davis come back and speak to me between the two cars, right.
Q Before you went back to your car to check on Mr. Witherspoon's identification, did you pat search him?
A No.
Q Did you pat search Mr. Davis?
A No.
Q Did you pat search Mr. McIntosh?
A No.
Q When you went back in the state police car, you received verification that, in fact, Mr. Witherspoon did not have any outstanding warrants?
A Correct.
Q But clearly didn't have a driver's license?
A Correct.
Q So it was your intention at that point in time to write him up for not having a driver's license?
A Correct.
Q Did you start the procedure for writing-.--out the citation while you got that information?
A Yes.
Q And that was while you were in the state police vehicle?
A Correct.
Q So when you then got out of the state police vehicle, where were the three males located?
A They were back in the car.
Q All sitting in the car?
A Um-hum.
Q So when you went back to the driver's side, was Mr. Witherspoon still there?
A Yes.

Q Even though he had admitted to you that he didn't have a driver's license?
A Right.
Q So when you got to the driver's side, then did you hand him the summary ticket?
A No, actually because I had noticed the videotape in the car on my original contact with them, so I had the videotape with me at that time. So I had him come out of the car, I brought him back, I talked to him about the videotape, where he got it, things like that. I gave the videotape back, explained the citation to him, had him sign his copy, gave him everything back then and told him he was free to goin between vehicles.
Q When did he get out of the car?
A Whenever I got out of my vehicle and the citation was completed, I had him get out of his car and come back and meet me between the vehicles.
Q Is it at that time that you pat searched him?
A No.
Q You did end up pat searching some people?
A Sure, after they gave consent, after they had signed a consent form we pat search them for our safety prior to searching the vehicle.
Q I don't want to take it out of chronological order here, but as you were walking back to the vehicle to give him his ticket for not having a driver's license is when you had noticed a videotape of "Enemy of the State" located in the rear windshield area of the vehicle?
A I noticed that before I went back to my vehicle to write the citation.
Q And because you knew that that movie was playing currently at a first-run theater, you were at least under the impression that there might have been a problem with this videotape being a bootleg videotape?
A Correct.
Q And, sir, didn't you have an experience like year

before where you had pulled over somebody and they had one of these videotapes and it turned out they had a lot of videotapes?

A That would be correct.

Q And that sort of piqued your interest because you had that prior experience?

A Right.

Q After you had the conversation with Mr. Witherspoon concerning where he had bought the bootleg videotape, you weren't going to arrest him for buying a bootleg videotape, were you?

A No, I wasn't.

Q In fact, he gave you an explanation you thought was plausible, because your understanding is that street vendors in big cities sell bootleg copies of videotapes?

A Correct.

Q So you had given him the ticket for driving without a license, explained that he could go, and you got into conversation with him concerning the videotape; isn't that right?

A Yes.

Q Now, at that point in time you're saying all the materials were given back to all the guys in the car and they were free to leave?

A Correct.

Q Now, at that point in time where were the persons located?

A Mr. Witherspoon was out of the vehicle with me, Davis and McIntosh were in the vehicle.

Q At that point in time did you instruct either Mr. Davis or Mr. McIntosh that one of the two of them would have to drive because, obviously, Mr. Witherspoon couldn't because he didn't have a license?

A Yes. I had brought Davis back and we had discussed that fact that he would have to drive because there was no driver's license for Witherspoon. I'm not exactly sure where this occurred, but we had discussed it and Davis had gone

back to the vehicle.

Q Well, at that point in time Mr. Davis was in the process of getting toward the driver's side of the car to drive away?

A You know, I really don't recall. I'm not sure where their positionings were. I know we had discussed the fact that he was not allowed to drive because he didn't have a license and Davis would have to drive.

Q To be kind here, when you saw the videotape you probably also looked inside the vehicle to see if there was any other contraband in plain view?

A Correct.

Q And you didn't see any drug contraband at all:?

A Not in the vehicle, no.

Q You didn't see any paraphernalia?

A Correct.

Q You didn't notice any odor of any substance like marijuana being smoked in the vehicle?

A Correct.

Q You didn't notice that any of the three individuals in the vehicle were under the influence of any, except the one guy was sleeping because that's why Mr. Witherspoon was driving?

A Correct.

Q So at that point in time there was no reason to believe that there was any drug activity going on with respect to that vehicle?

A Okay. Well, the only reason that would give me to suspect drug activity, one would be the belt Mr. Witherspoon had on had marijuana leaves on it; the second would be the fact that they were coming from a source city, coming from New York City traveling back to where they were going to back to, Michigan.

Q And I do recall you mentioning that sometime at the preliminary hearing. Did you not know of the federal program that marks certain identifying issues with respect to people on interstate roads that they might be drug couriers?

A Go through that again.
Q Are you familiar with the national program that had been established where they looked for certain indicators of people that might be transporting drugs on the interstate highways?
A When I went through the academy we talked about different things. I don't know of any roads listed that people would be driving on or anything like that.
Q Not roads, I'm just saying that you were trained that as a state trooper at the academy, and maybe even subsequent to being at the academy, that there are indicators that you might want to look at about people that transport drugs on interstate roads, correct?
A Correct.
Q And obviously you wouldn't have seen the belt buckle of Mr. Witherspoon when he was driving by?
A Correct.
Q Because you obviously wouldn't see his belt; is that correct?
A Correct.
Q But you did seem to indicate that he had Michigan plates and he said he came from New York City?
A Um-hum.
Q Now, that piqued your curiosity because of a profile that was provided to you by either at the state police academy or subsequent thereto that people with out-of-state plates that said they came back from New York City may, in fact, be smuggling drugs?
A I wouldn't say a profile. I would say it's based on the fact that officers who have stopped people on Interstate 80, that that is one of the main things they find when traveling from New York City.
Q That I-80/1-79 intersection down there is relatively famous for large drug seizures based upon that type of profile stop, correct?
A Right.
Q So when you saw the Michigan vehicle, did the fact

that it had Michigan plates lead you to believe that there might be drug activity going on?
A No.
Q Did the fact that it was Michigan plates and a black driver, did that cause you to think there might be drug activity going on?
A Prior to stopping them?
Q Right.
A No.
Q So it was only when you saw the Michigan plates, the black driver, and they said they were coming from New York City did you possibly believe that there was drug activity going on?
A Like I said, the belt that he had, the fact that they were coming from New York City, the fact that we already found the counterfeit tapes in the vehicle, those are all things that made me want to search the vehicle further.
Q So we're clear, it's the Michigan plates, the tape or tapes?
A There was one or two others discovered in the search.
Q You actually only saw one, "Enemy of the State"?
A Right.
Q The fact that Mr. Witherspoon indicated they were coming back from a weekend in New York City?
A Correct.
Q Those are the three factors?
A Correct.
Q So based upon that you said, well, okay, would you give me permission to search your vehicle looking for drugs, because of your background and understanding that they miight be transporting drugs?
A Correct.
Q Mr. Witherspoon might have said words to the effect, "Sure, I don't have of any drugs in the vehicle, and what do I need to sign?" or words to that effect?
A Right.

Q And he signed a consent that is now a part of the record in this case?
A Correct.
Q After he signed the consent -- strike that. How many state troopers were there at the time that you asked him to sign the consent?
A Trooper Meredith may have been there at that time. I believe he probably was. He was in his vehicle behind me.
Q And you were in your vehicle by yourself?
A Yes.
Q And Trooper Meredith was obviously in a separate vehicle by himself?
A Yes.
Q So then when the consent is signed, you two troopers were there?
A Yes.
Q When does Trooper Kloss come on board?
A Trooper Kloss gets involved after we're back at the barracks.
Q So the only two troopers that participated in the search of the vehicle on Interstate 90 was yourself and Trooper Meredith?
A Actually I was there, I called for somebody else to come up there because I was going to be asking for consents. Trooper Meredith arrived. After Trooper Meredith was there, Trooper Stetson came and Trooper Angelo came and Trooper Meredith left. So during the search there was myself, Trooper Angelo, Trooper Stetson, and Corporal Frankowski a supervisor, arrived also. So there were four of us there.
Q And it was first you and Trooper Meredith when the consent was signed, and then the other two troopers arrived prior to the search being instituted?
A Yes.

THE COURT: Well, wait a minute. I thought he said during the search. Did they arrive prior to the search or during the search? There's a difference.

THE WITNESS: Trooper Angelo and Trooper Stetson were there prior to the search. Corporal Frankowski showed up once we had gotten them out of the vehicle. As we were just beginning the search, Corporal Frankowski showed up.

BY MR. ADAMS:
Q Okay. Now, what led you to patting down the individuals in the vehicle?
A Well, we were having them move away from the vehicle. They were going to be standing behind us at our vehicle, and we patted them down to make sure they didn't have any weapons on them.
Q You didn't see any indicia of any weapons in the vehicle?
A No.
Q You didn't have any evidence indicating they gyre armed at all?
A Correct.
Q And, in fact, you made observations of all three of them prior to asking for consent, and you did not feel the need to pat them down before you asked for the consent?
A Correct.
Q Did anything change that we're not familiar with that leads you to wanting to pat them down just because they signed a consent form?
A They were going to be behind us. We were going to be in their vehicle with our backs toward them searching the vehicle and they were going to be behind us, and I wanted to make sure they didn't have any weapons on that could harm me. I'm not going to pat you down when I'm doing a traffic stop, but when I'm going to be putting myself in a vulnerable position, I'm going to pat somebody down.
Q They weren't handcuffed or anything?

A No.
Q After they were patted down, then how many troopers participated in the search?
A Myself and Trooper Angelo.
Q After you found the marijuana, either you or Trooper Angelo confronted Mr. Witherspoon concerning the marijuana being in the trunk?
A When we found the marijuana -- when we were cnducting the search, they said it was cold outside. Trooper Angelo asked them if they wanted to sit in the vehicle and they said yes. So all three of them were sitting in the rear of one of the police vehicles when we conducted the search. When we discovered the marijuana, we got them out of the vehicle and handcuffed them.
Q After you found the marijuana?
A Right.
Q All three of them were charged with possessing the marijuana?
A Correct.
Q And for some reason Mr. Witherspoon is the only case pending?
A Correct.
Q The other cases were dismissed by the DA or by the Court?
A Correct.

MR. ADAMS: I have nothing further of this witness. Thank you, trooper.

THE COURT: Anything else?

MR. HOPKINS: No.

THE COURT: You may step down.

MR. HOPKINS: I would submit Suppression Exhibit A for the Court's review.

THE COURT: Are you resting?

MR. HOPKINS: Yes, Your Honor.

MR. ADAMS: Judge, we would only ask thathe Commonwealth enter into a stipulation that both Mr. Davis and Mr. McIntosh's cases were nolle prossed by the district attorney, or the Court can take judicial notice.

THE COURT: I don't know that.

MR. HOPKINS: I'll enter into the stipulation. Attorney Vogel from our office did not feel that the possessory offenses could be proven against the other two passengers but only against the driver, and, therefore, those offenses have been nolle prossed.

THE COURT: All right. You are not presenting evidence?

MR. ADAMS: No, Judge.

THE COURT: We're ready for argument.

MR. ADAMS: Although we haven't presented a copy of the case, we'd be glad to. Justice Rehnquist indicated in 1998 in Knowles versus Iowa of an almost identical fact situation to this particular case, and the bottom line of Knowles is the fact that once the state police pull an individual over for speeding, which was the case in Knowles, unless there was some basis to determine that there was criminal activity afoot, like the smell of marijuana, they looked like they were on drugs, there were drugs in plain view inside the vehicle, that the state is not even allowed to ask an individual for consent for those purposes; all they can do is provide him with a ticket and get him on their way. In this particular situation it is clear that the trooper specifically indicated that there were three factors why he wanted to ask for consent,

and that was the possession of a videotape, which obviously has nothing to do with narcotics; secondly, the fact that the car had Michigan plates, which on an interstate road I don't know what percentage is going to have Michigan plates, but since we're pretty close to Michigan, I would say it would be substantial; and third, because Mr. Witherspoon indicated an innocuous statement that these gentlemen had gone for the weekend to New York City. From that standpoint, that hooks into the next argument, which has to do with both the profile stop and the pretext stop. The profile stop reflects the fact that the three individuals in the car were black. He does recall being at the state police academy when they did talk about profile stops, the fact of out-of-state people going to big cities and, unfortunately, I think, using minorities as the factor can cause the troopers to reasonably believe there was some drug activity afoot.

THE COURT: I don't think he testified he used the minority race as a factor. That's something you're saying.

MR. ADAMS: I'll rely on the transcript.

THE COURT: I recall it specifically. He did not say that.

MR. ADAMS: From that standpoint, it would appear there was a Knowles violation for sure, because there wasn't any basis whatsoever to ask for consent. We believe this may have been a pretext or may have been a profile stop based upon the information the trooper has testified about, that there was no basis in the Pennsylvania Constitutional law to allow the state police to question or to detain Mr. Witherspoon after giving him either the speeding ticket in this case or the ticket for driving without a license. And obviously the Pennsylvania State Police have lacked reasonable suspicion and/or probable cause regarding the search of the subject vehicle itself, which, again, is sort

of a secondary response to the Knowles decision. For those reasons we would ask that the evidence in this case be suppressed, together with the statement that has been entered by Mr. Witherspoon as being fruit of the poisonous tree, together with any other evidence that was obtained as a result of the stop.

THE COURT: Commonwealth.

MR. HOPKINS: Your Honor, in Commonwealth v. Hoak, our Supreme Court has addressed this issue, and they basically said once the trooper tells the individual you are free to go and returns all necessary items so that person can leave, that they do not need probable cause or reasonable suspicion to ask for consent to search or to further speak with the individual, provided that they volunteer to do it. In this case the trooper indicated he gave everything back and said, "Would you mind answering some questions with me?" He said, "No, that's fine. I'll do that." "Where were you coming from? Where were you going to." At this point in time he also told the Court he now sees marijuana leaves decor around the belt that he was wearing. He also indicates to the Court that he has now seen that videotape, and I'm not sure where we're getting the idea that his only s ?arch was for drugs. He said, "Do you have anything illegal in the car that you shouldn't have? Weapons, drugs, anything, any more tapes?" He was told no. He said, "Do you mind if I search?" So the consent to search was signed, which the Court has. The police officer then called for his backup, went through the normal routine of going through a consensual search of the vehicle, found two more of the illegal tapes and found a brick of marijuana under the carpet in the trunk. I don't see where there's a violation of Hoak or Knowles or the consent to search rules presented through Hoak in the Pennsylvania Supreme Court. What you have here is a trooper who pulled over the individual for going 62 and the combined issue of he thought he was

underage. He's very honest with the Court; but for thinking the defendant was underage, he probably wouldn't have bothered to pull him over for 62 in a 55, but the two factors alone made him want to pull him over. He found he was overage, but also found out he was unlicensed. Went through and cited for that, gave everything back, and he then even in my mind adds to his credibility when he says to the Court, "No, I wasn't going to cite him for 62 in a 55. I would have never pulled him over if that was the only thing going on." So he gives him a verbal warning for that, tells him he's free to go, asks for a valid consent to search. I ask that the Court not suppress the evidence.

MR. ADAMS: If I might briefly respond, just to make sure the record is clear, there is no indication that there is any criminal violation with respect to possessing either of those two videotapes. There is no proof, in fact, that even possessing counterfeit videotapes is a crime. Selling them is; possessing them isn't.And he was not charged for those purposes. So I want to make the record clear, we would object to the Commonwealth's indication that it's unlawful to possess those tapes.

MR. HOPKINS: I didn't say that. First of all, there is no citation. The statute says if it's only in possession that the trooper should either seize it and destroy it or not cite the individual. However, given that he had prior experience with counterfeit tapes, as Mr. Adams brought out, and he found a counterfeit tape, he had every reason to believe that, asking to search for the counterfeit tapes, which is one of the things he asked for. He may have found a bucket or box full of them in the trunk. At that point he has a reason to ask for that search.

THE COURT: Mr. Adams, sit down. Let him finish his argument. If you want to make some further argument, ask

the Court, but just don't stand up in the middle of his argument.

MR. ADAMS: Sorry. I was looking for the document of Exhibit 1 so I could refer to it.

THE COURT: Do you want to say something further then?

MR. ADAMS: I would like to see the consent.

THE COURT: Here's Exhibit 1.

MR. ADAMS: I will not make any other further argument, other than to indicate that the waiver of rights and consent to search indicates weapons, narcotics, and fruits of a crime. There's no indication of a videotape.

THE COURT: We'll hand down a decision shortly.

(Court adjourned at 11:35 a.m.)